If this rule is adopted, there is still no reason why it should not be construed liberally, and a substantially just result reached in such cases as the instant one. There, it was not only the perjury of the defendant, but the innocent but mistaken testimony of other witnesses, including those of the railway company itself, induced, however by the fraud of the plaintiff, that secured the verdict. The jury was given no opportunity to detect the fraud by passing on the credibility of the expert witnesses, since their testimony was given in perfect good faith. In other words, the fraudulent representations of the defendant, out of court, prevented the present plaintiff from interposing a defence he could otherwise have used. And there is little doubt that a different result would then have been reached in the original action. Thus, the instant case could be decided in the same way under either of the two lines of federal decisions.

As for the federal rule itself, it must still remain unsettled. Since the courts are at liberty to cite either line of authorities, and do so as suits their convenience, the only possible answer in spite of repeated assertions that the federal rule is clear, is that there is no federal rule at all. And there will be none until one or the other of the conflicting decisions is overruled.

TELEGRAMS BETWEEN POINTS IN ONE STATE PASSING THROUGH AN ADJOINING STATE—The brief opinion of the United States Supreme Court in the recently decided case of *Western Union Telegraph Co.* v. *Speight*[1] recalls again the controversy whether commerce between two points in one state but passing en route through an adjoining state constitutes interstate commerce. And if it does, are state laws governing the liability of a defendant engaged in such commerce inapplicable under all conditions? In this case a telegram was transmitted from Greenville, N. C., to Rosemary, N. C., but routed by the company through two relay points in Virginia. Since the suit was based on mental anguish caused by the negligence of the defendant, for which North Carolina allows a recovery,[2] the company defended on the ground that the message was interstate, so that its liability was determined by the federal rule which denies recovery for mental anguish alone.[3] The jury found that the defendant sent the message through Virginia for the "purpose of fraudulently evading liability under the laws of North Carolina", and gave the plaintiff a verdict. The trial judge set this aside "as a matter of law", and on appeal the State Supreme Court set aside the non-suit and ordered judgment entered on the verdict. Then the United States Supreme Court reversed the judgment on the grounds that the message was interstate in fact and that the court below erred in ruling that the burden was on the company to prove that it had not routed the message through Virginia in order to evade the state's jurisdiction. The court said the burden was on the plaintiff to make out her case. Justice Holmes scrupulously avoided deciding whether the company's motive were material, and if it were, what the theory of the plaintiff's recovery would be. The case, however, does decide that the message was interstate in fact, and in the dictum we learn that if the company had adopted an unreasonable method of transmission, "the liability, if it existed, would not be a liability for an intra-

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the state was allowed to prosecute for bigamy where the defendant had previously obtained a fraudulent divorce.

[1] (1920) 41 Sup. Ct. 11.

[2] *Bright* v. *Western Union Tel. Co.* (1903) 132 N. C. 317, 43 S. E. 841; *Green* v. *Western Union Tel. Co.* (1904) 136 N. C. 489, 49 S. E. 171.

[3] *Stansell et al.* v. *Western Union Tel. Co.* (C. C. 1900) 107 Fed. 668; *Western Union Tel. Co.* v. *Burris* (C. C. A. 1910) 179 Fed. 92; *Southern Exp. Co.* v. *Byers* (1916) 240 U. S. 612, 36 Sup. Ct. 410.

state transaction that never took place, but for the unwarranted conduct". On what theory this liability, if any, would arise is not clear.

It is now definitely settled that the power of Congress over commerce admittedly interstate is not absolutely exclusive, but concurrent with that of the states, *i. e.*, in local matters not demanding uniformity of regulation the states in the exercise of their reserved police power may "incidentally affect" interstate commerce.[4] And so in the absence of federal statutes, state regulations of telegraph companies have been upheld where there was no direct and immediate effect upon interstate commerce;[5] but where the effect of the state statute was to regulate the delivery of a message outside the state, it has been held invalid as a direct burden on interstate commerce;[6] similarly where the effect of the statute was to put a burden upon interstate commerce even within the state.[7] These statutes have been allowed to prevail within the limited field indicated; but since the power of Congress over all interstate commerce is beyond dispute, though the existence of this power in Congress does not of itself preclude state action, the exercise of that power will oust the jurisdiction of the states. Once Congress has by its enactments taken possession of the field formerly occupied by the states, the latter must yield.[8]

On this reasoning it is not difficult to explain the decisions in the telegraph cases prior to the Act of Congress of June 18, 1910,[9] whereby Congress brought under federal control all interstate telegraph business, thus ousting state regulation. These decisions are to the effect that in cases of interstate telegraph messages state statutes regulating the defendant's liability, which have no direct extrastate effect are enforceable and not in conflict with the commerce clause of the federal constitution.[10] These cases fall into the field of concurrent federal and state jurisdiction, where in the absence of congressional action the state rules are valid. Since the Act of 1910, the decisions uphold the view that states lack the power to determine the conduct

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[4] *County of Mobile* v. *Kimball* (1880) 102 U. S. 691; *Smith* v. *Alabama* (1888) 124 U. S. 465, 8 Sup. Ct. 564; see *Covington, etc. Bridge Co.* v. *Kentucky* (1894) 154 U. S. 204, 14 Sup. Ct. 1087; (1905) 5 COLUMBIA LAW REV. 298.

[5] *Western Union Tel. Co.* v. *James* (1896) 162 U. S. 650, 16 Sup. Ct. 934; *Western Union Tel. Co.* v. *Commercial Milling Co.* (1910) 218 U. S. 406, 416, 31 Sup. Ct. 59; *Western Union Tel. Co.* v. *Crovo* (1911) 220 U. S. 364, 31 Sup. Ct. 399.

[6] *Western Union Tel. Co.* v. *Pendleton* (1887) 122 U. S. 347, 7 Sup. Ct. 1126.

[7] *Central of Ga. Ry.* v. *Murphey* (1905) 196 U. S. 194, 25 Sup. Ct. 218; (1908) 8 COLUMBIA LAW REV. 507.

[8] *Adams Exp. Co.* v. *Croninger* (1913) 226 U. S. 491, 33 Sup. Ct. 148; *Missouri, etc. R. R.* v. *Harriman* (1913) 227 U. S. 657, 33 Sup. Ct. 397; *Adams Exp. Co.* v. *Cook* (1915) 162 Ky. 592, 172 S. W. 1096; *cf. Pennsylvania R. R.* v. *Hughes* (1903) 191 U. S. 477, 24 Sup. Ct. 132, where in the absence of a federal statute, it was held that the state had the power to refuse to allow the defendant to limit its liability for negligence to the agreed valuation, in a contract for the interstate transportation of goods.

[9] (1910) 36 Stat. 539, c. 309, § 7, U. S. Comp. Stat. (1916) § 8563.

[10] *Western Union Tel. Co.* v. *Ferris* (1885) 103 Ind. 91, 2 N. E. 240; *Western Union Tel. Co.* v. *James* (1892) 90 Ga. 254, 16 S. E. 83, followed in *Western Union Tel. Co.* v. *Lark* (1895) 95 Ga. 806, 23 S. E. 118; *Western Union Tel. Co.* v. *Mellon* (1898) 100 Tenn. 429, 45 S. W. 443; *Burgess* v. *Western Union Tel. Co.* (1898) 92 Tex. 125, 46 S. W. 794; see *Butner* v. *Western Union Tel. Co.* (1894) 2 Okla. 234, 37 Pac. 1087; *Western Union Tel. Co.* v. *Powell* (1897) 94 Va. 268, 26 S. E. 828; *cf.* also, *Vermilye* v. *Western Union Tel. Co.* (1911) 207 Mass. 401, 93 N. E. 635, decided similarly after the passage of the Act of 1910, the latter not being mentioned in the opinion.

required of a telegraph company in the transmission of interstate messages, or to determine its liability if it does not preserve such conduct.[11]

So much for commerce between termini in different states. The first problem as to commerce between termini in the same state but passing en route through another is whether this constitutes interstate commerce. In *Hanley* v. *Kansas, etc., R. R.,*[12] a state railroad commission was held powerless to fix and enforce rates for the transportation of goods over such a route on the ground that the commerce was interstate in fact.[13] It is important to note that we are not concerned here with the power of states to tax or regulate incidentally commerce which is admittedly interstate,[14] but solely with the problem whether the commerce is interstate in fact. Most of the cases decided subsequently to the *Hanley* case in the federal and state courts have declared commerce between two points in one state but passing through another to be interstate.[15] A few cases, however, in deference to mistaken conclusions drawn from the case of *Lehigh Valley R. R.* v. *Pennsylvania,*[16] as Justice Holmes points out in the *Hanley* case,[17] have reached the opposite conclusion.[18] In the *Lehigh* case, a state tax on gross receipts "determined in respect of receipts for the proportion of the transportation taking place within the state" was upheld, but it is evident the case did not decide that this class of commerce was for no purposes to be regarded as interstate. And even within the narrow field of its application it is doubtful to-day whether the case is of great efficacy.[19] The overwhelming weight of authority accords with the view that such commerce is interstate. And whether, admitting this, the states can determine the liability of a defendant in any way in respect to such commerce, is a different problem.

Yielding to the supposed rule laid down in the *Lehigh* case with respect to railroads, the doctrine was extended in a few cases to telegraph messages.[20]

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[11] *Western Union Tel. Co.* v. *Compton* (1914) 114 Ark. 193, 169 S. W. 946 (on rehearing); *Western Union Tel. Co.* v. *Bilisoly* (1914) 116 Va. 562, 82 S. E. 91; *Western Union Tel. Co.* v. *First Nat'l Bank* (1914) 116 Va. 1009, 83 S. E. 424; *Western Union Tel. Co.* v. *Simpson* (1915) 117 Ark. 156, 174 S. W. 232; *Western Union Tel. Co.* v. *Kaufman* (1917) 62 Okla. 160, 162 Pac. 708; *Gardner* v. *Western Union Tel. Co.* (C. C. A. 1916) 231 Fed. 405; *Postal Tel. Cable Co.* v. *Warren-Godwin Lumber Co.* (1919) 40 Sup. Ct. 69; see *Western Union Tel. Co.* v. *Schoonmaker* (Tex. Civ. App. 1916) 181 S. W. 263.

[12] (1903) 187 U. S. 617, 23 Sup. Ct. 214.

[13] See (1913) 13 COLUMBIA LAW REV. 551.

[14] See *Maine* v. *Grand Trunk R. R.* (1891) 142 U. S. 217, 12 Sup. Ct. 121.

[15] *United States* v. *Delaware, etc. R. R.* (C. C. 1907) 152 Fed. 269; *United States* v. *Erie R. R.* (D. C. 1909) 166 Fed. 352; *St. Louis, etc. R. R.* v. *Hadley* (C. C. 1909) 168 Fed. 317, 340; *St. Louis, etc. R. R.* v. *State* (1908) 87 Ark. 562, 113 S. W. 203; *Mines* v. *St. Louis, etc. R. R.* (1908) 134 Mo. App. 379, 388, 114 S. W. 1052; *Crescent Brewing Co.* v. *Oregon, etc. R. R.* (1913) 24 Idaho 106, 132 Pac. 975; *St. Louis, etc. R. R.* v. *Spriggs* (1914) 113 Ark. 118, 167 S. W. 96; *Holden* v. *Maine Central R. R.* (1914) 77 N. H. 397, 92 Atl. 334; see *Patterson* v. *Missouri Pacific R. R.* (1908) 77 Kan. 236, 94 Pac. 138; *Davis* v. *Southern Ry.* (1908) 147 N. C. 68, 72, 60 S. E. 722; *Hardwick Farmers' Elevator Co.* v. *Chicago, etc. Ry.* (1910) 110 Minn. 25, 32, 124 N. W. 819, reversed on another point in (1913) 226 U. S. 426, 33 Sup. Ct. 174; *Bowles* v. *Quincy, etc. R. R.* (Mo. App. 1916) 187 S. W. 131.

[16] (1892) 145 U. S. 192, 12 Sup. Ct. 806.

[17] *Hanley* v. *Kansas, etc. R. R., supra,* footnote 12, at p. 621.

[18] *Campbell* v. *Chicago, etc. Ry.* (1892) 86 Iowa 587, 53 N. W. 351; *Seawell* v. *Kansas City, etc. R. R.* (1893) 119 Mo. 222, 24 S. W. 1002; see *Dillon* v. *Erie R. R.* (1897) 19 Misc. 116, 124, 43 N. Y. Supp. 320; *quaere, Burlington, etc. Ry.* v. *Dey* (1891) 82 Iowa 312, 339, 48 N. W. 98.

[19] See (1913) 13 COLUMBIA LAW REV. 551.

[20] *State* v. *Western Union Tel. Co.* (1893) 113 N. C. 213, 18 S. E. 389;

However, the sounder view follows the principle of the *Hanley* case in calling such commerce interstate, and since by the Act of 1910 Congress has taken possession of the field, holds that states are powerless to determine the liability of a telegraph company in respect to the transmission of such messages.[21] This may be laid down as the general proposition applicable to-day.

But one's instincts naturally rebel at the thought that a defendant by deliberately routing the message through another state should be suffered to evade the state laws. Suppose, for example, that in the principal case, the jury under proper instructions had brought in a finding that the telegraph company sent the message through Virginia for the "purpose of fraudulently evading liability under the laws of North Carolina". It seems clearly wrong in such a case to say the commerce has been changed from interstate to intrastate because of the defendant's bad motives. Justice Holmes points out that the commerce in question is "interstate as a matter of fact. The fact must be tested by the actual transaction".[22] A few cases which have indicated that the motives of the defendant could change the character of the commerce, so as to preclude the defendant from fraudulently evading the state laws, seem to proceed on an erroneous theory.[23] The message is interstate, factually; the

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followed in *Leavell* v. *Western Union Tel. Co.* (1895) 116 N. C. 211, 21 S. E. 391. In the latter case it appeared that the defendant operated, also, a continuous intrastate route. *Western Union Tel. Co.* v. *Reynolds* (1902) 100 Va. 459, 41 S. E. 856. In this case the court (per Whittle, J.) said at p. 464: "Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a domestic message, and its character in that respect is not altered by the circumstance that the line passes in part over territory of another state . . . And the response of the company that it was guilty, but guilty at a point beyond the limits of the state, constitutes no defense."

[21] *Western Union Tel. Co.* v. *Lee* (1917) 174 Ky. 210, 192 S. W. 70; *Western Union Tel. Co.* v. *Kaufman, supra,* footnote 11; *Western Union Tel. Co.* v. *Bolling* (1917) 120 Va. 413, 91 S. E. 154; *Western Union Tel. Co.* v. *Mahone* (1917) 120 Va. 422, 91 S. E. 157. In the latter case even though it appeared that the intrastate route was quicker and more expedient, the court (per Prentis, J.) said at p. 423: "The Supreme Court of the United States, however, has made it plain that in determining such questions, they will only consider the facts, and not inquire as to motives". *Western Union Tel. Co.* v. *Bowles* (1919) 124 Va. 730, 98 S. E. 645, is an interesting case, holding invalid a statute (Acts 1916, c. 439) declaring that all messages accepted by a telegraph company for transmission between two points in the state, should be deemed intrastate, and that if a company wished to impress an interstate character, it was incumbent on such company to produce evidence that the intrastate route was the only feasible and practicable method of transmission. The court held this to be an encroachment upon the realm of exclusive federal control, since the Act of 1910.

[22] Citing *Hanley* v. *Kansas, etc. R. R., supra,* footnote 12 and *Kirmeyer* v. *Kansas* (1915) 236 U. S. 568, 35 Sup. Ct. 419.

[23] In *Western Union Tel. Co.* v. *Taylor* (1914) 57 Ind. App. 93, 104 N. E. 771, in a *dictum* the court declared that where there was no proof that the route used was the only route between the two termini, or that the interstate route was more feasible than the intrastate one, it could not agree that the commerce was interstate because if it were classed as such, "any and all intrastate messages could be made interstate messages at the option of appellant". A very sweeping decision is found in *Western Union Tel. Co.* v. *Sharp* (1915) 121 Ark. 135, 180 S. W. 504, where the court (per McCulloch, J.) says at p. 142: "It is sufficient to confine ourselves to the rule announced by the Indiana court [*Taylor* case] that the message is not an interstate one unless it appears that the only method of transmission necessarily carried it beyond the lines of the state. But we think the sounder rule is to say that, so far as a telegraph message is concerned, the right of control is exclusively with the state, where the message is sent from one point to another in the state, regardless of the fact that

Supreme Court has said that the physical facts are to govern in such cases, and the message actually went outside the state.

Now admitting the message to be interstate, are we going to allow the defendant to evade the state laws? At first blush, it seems fairly inconceivable that this should be a necessary result. Of course if the message had not been sent at all, the company, in all probability, would not be heard to insist that the federal rule apply because it might have used the interstate route[24] But in the instant case, it has sent the message, and the latter is interstate regardless of the defendant's motives. The defendant has subjected itself to all those rules of liabilty which govern an interstate telegraph message. Since the Act of 1910, as pointed out, all these rules are the ones laid down in the federal courts; it is the federal rule which should determine the defendant's liability for negligent transmission of the message, and the federal rule applicable is that no recovery can be had for mental anguish alone. This is a necessary incident of the message being interstate as a matter of fact, of the defendant's so conducting this business as to come under the federal and not the state laws. Congress might well pass a statute to the effect that where it appeared the defendant wilfully routed the message interstate to escape state liability, the state laws should yet apply. But then the message would not be made intrastate; it would be the federal rule that would apply, although in the particular instance the federal rules of liability would conform by statute to that of the state.

Cases like *Austin* v. *Tennessee,*[25] and *Cook* v. *Marshall County*[26] where the tricks and devices of the defendants were not allowed to turn boxes into "original packages" within the judge-made rule[27] are to be distinguished; in these cases the court held the boxes were not *actually* "original packages" within the constitutional import of the term as interpreted by the Supreme Court up to that time. But in determining whether a particular transaction is interstate the Supreme Court has laid down the definite and fixed rule that the physical facts shall govern, regardless of the motives or animating influences of the defendant.[28] And once given an interstate telegraph transaction, the courts have very definitely said that the federal law determines the defendant's liability. In the light of the "physical fact" laid down by the United States Supreme Court as decisive of the interstate character of a transaction, and in the light of the construction placed by the courts upon the Act of 1910, as ousting state laws in toto from determining the legal consequences of an interstate telegraph transaction, it seems there is no way of imposing a liability upon the defendant on the facts of the principal case. The remedy lies with Congress alone. And in the long run, is there not merit in the unmistakable tendency toward one uniform rule in the case of those businesses as the railroad and telegraph, which are essentially national in character?

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the state line is crossed, and that such message does not constitute an act of interstate commerce. That is the conclusion which we prefer to announce as the law applicable to this case".

[24] See *Ware and Leland* v. *Mobile County* (1908) 209 U. S. 405, 28 Sup. Ct. 526.

[25] (1900) 179 U. S. 343, 21 Sup. Ct. 132.

[26] (1905) 196 U. S. 261, 25 Sup. Ct. 233.

[27] The rule was laid down by Chief Justice Marshall in *Brown* v. *Maryland* (1827) 25 U. S. 419.

[28] "We cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the statutes of the state, suffice to change the nature of the transaction". Per McReynolds, J., in *Kirmeyer* v. *Kansas, supra,* footnote 22, at p. 572.